SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 251

STATE OF NEW YORK,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 251

In the Matter of

INDEPENDENT AUTOMOBILE FORWARDING CORPORATION,

Bankrupt,

STATE OF NEW YORK,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

May It Please the Court:

The petitioner, State of New York, respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved.

The Independent Automobile Forwarding Corporation was adjudicated a bankrupt in the District Court for the Western District of New York on April 26, 1938. On the

same date, Claire M. Britt was duly appointed Trustee to liquidate the said corporation, and thereafter he duly qualified and acted, and still is acting, as such Trustee (R. 6). Trustee herein, by petition to the District Court, verified the 2nd day of May, 1939, showed that he had for distribution to priority creditors the sum of Three Thousand Fifty-Three and 20/100 ($3,053.20) Dollars (R. 7). The priority creditors are as follows:

State of New York for Unemployment Insurance Taxes	$3,305.82 (R. 8)
State of New York for Taxes under §§ 183 and 184 of the Tax Law	2,720.80 (R. 8)
U. S. Dept. of Int. Rev., 1937 Capital Stock Tax	307.13 (R. 8)
U. S. Dept. of Int. Rev., 1937 for Taxes under Titles VIII and IX of the Social Security Act	7,036.98 (R. 7)

The amount of Seven Thousand Thirty-six and 98/100 ($7,036.98) Dollars, above referred to, is for taxes under Title IX of the Federal Social Security Act (c. 531, 49 Stat. 639), amounting to Three Thousand Four Hundred and 49/100 ($3,400.49) Dollars (R. 13) and the balance of Three Thousand Six Hundred Thirty-six and 49/100 ($3,636.49) Dollars is for taxes under Title VIII of the Federal Social Security Act (c. 531, 49 Stat. 639). The State of New York requested the Trustee herein to object to 90% of the claim of the United States under Title IX of the Federal Social Security Act on the ground that it was a penalty and not provable against the bankrupt pursuant to § 57 (j) of the Bankruptcy Act. The Trustee filed his petition for instructions governing the payment of such priority claims, and an order thereon was made on June 23, 1939, by Honorable John Knight, District Judge for the Western District of New York, which order allowed the claims of the

United States in full. An appeal from this order was taken to the Circuit Court of Appeals for the Second Circuit by the State of New York. Thereafter, and on August 10, 1939, Congress enacted certain amendments to the Federal Social Security Act concerning the credit provisions of that Act in so far as they affected insolvent estates in the custody of courts of competent jurisdiction.

By stipulation dated June 9, 1939, between George L. Grobe, United States Attorney for the Western District of New York, Attorney for the United States, and John J. Bennett, Jr., Attorney General of the State of New York, Attorney for the State of New York, an order was made by Honorable Learned Hand, Presiding Judge of the Circuit Court of Appeals for the Second Circuit, discontinuing that appeal and remanding the case to the District Court for resettlement of its order of June 23, 1939, in accordance with the amendments to the Federal Social Security Act enacted August 10, 1939 (R. 10-12). The matter was then brought on before Honorable John Knight, District Judge, who made an order on July 21, 1940, allowing the claims filed herein in the following amounts (R. 4-6):

United States for Title IX taxes	$660.10
United States on all other tax claims	828.14
State of New York on its claim for unemployment insurance	858.42
State of New York on all other tax claims	706.53

The District Court held that the priority claims were to be paid on the basis of 25.967% thereof, using the following algebraic quadratic equation (R. 13-14):

$$X = \frac{(A\&B) \pm \sqrt{(A\&B)^2 - 4AT}}{2A}$$

The symbol "A" in the quadratic equation is used for the amount of the claim of the State of New York for unemploy-

ment insurance; the symbol "B" for the total of all other taxes; the symbol "T" for the total assets to be distributed; and, the symbol "X" for the percentage of distribution to be determined (R. 14).

An appeal from the order of Honorable John Knight, District Judge, dated July 21, 1940, was taken by the State of New York to the United States Circuit Court of Appeals for the Second Circuit. The Circuit Court of Appeals for the Second Circuit reversed the order of the District Court and remanded the cause for a determination of the amounts allowable on the claims of each of the claimants in accordance with its opinion (R. 30). The Circuit Court of Appeals sustained the contention of the State of New York that so much of the claim of the United States which represented taxes due pursuant to § 801 of Title VIII of the Federal Social Security Act was not a tax imposed upon the bankrupt, in that the bankrupt was liable only as an agent bound to pay whether its duty to collect was performed or not.

The court held that the liability of the bankrupt was a liability for a debt instead of taxes due and owing the United States and, therefore, did not form the basis of a claim entitled to priority under § 64 (a) (4) of the Bankruptcy Act (R. 27). The Circuit Court of Appeals overruled the contention of the State of New York that the bankrupt estate was entitled to a credit amounting to 90% of the claim of the United States for taxes under Title IX of the Social Security Act, and sustained the use by the District Court of the algebraic quadratic equation in arriving at the percentage of distribution (R. 30). It also overruled the contention of the State of New York that 90% of the claim of the United States under Title IX of the Social Security Act was a penalty and, therefore, not provable against the bankrupt estate pursuant to § 57 (j) of the Bankruptcy Act (R. 29).

Petitioner seeks a review by certiorari in this Honorable Court to determine whether, in a bankruptcy proceeding wherein a claim is made by the United States for taxes under Title IX of the Social Security Act, the estate is entitled to a credit not exceeding 90% of the claim of the United States for such taxes, and also, whether 90% of such tax, as imposed by § 901 of the Federal Social Security Act, is a penalty and, therefore, not provable against the bankrupt estate pursuant to § 57 (j) of the Bankruptcy Act.

Questions Presented.

The questions which are presented for review are:

1. Is the bankrupt entitled to a credit amounting to 90% of the claim of the United States for taxes under Title IX of the Social Security Act?

2. Is 90% of the tax imposed by § 901 of the Federal Social Security Act a penalty and, therefore, not provable against the bankrupt estate herein, pursuant to § 57 (j) of the Bankruptcy Act?

Reasons Relied Upon for Allowance of the Writ.

It is respectfully submitted by your petitioner and relied upon as reasons for granting of the writ that:

(a) The act of the Circuit Court of Appeals for the Second Circuit in holding that the bankrupt estate was not entitled to a credit amounting to 90% of the claim of the United States for taxes under Title IX of the Social Security Act defeats the purpose and scope of the Social Security Act and the Bankruptcy Act, as defined by Congress.

(b) The act of the Circuit Court of Appeals for the Second Circuit in holding that 90% of the tax imposed under § 901 of the Federal Social Security Act is not a

penalty defeats the purpose and scope of the Bankruptcy Act as defined by Congress.

(c) That the decision of the Circuit Court of Appeals for the Second Circuit has decided important questions of Federal law which have not been, but should be, settled by this Honorable Court.

(d) The Circuit Court's holding that 90% of the tax imposed under § 901 of the Federal Social Security Act is not a penalty is probably in conflict with the decisions of this Honorable Court in *United States* v. *Constantine*, 296 U. S. 287, and *Carter* v. *Carter Coal Co.*, 298 U. S. 238.

The decision of the Circuit Court of Appeals for the Second Circuit is of peculiar public interest and presents a fundamental question of law upon which there should be no diversity of opinion in the various United States District Courts' jurisdictions.

In the following cases, United States District Courts have upheld the contention that 90% of the tax assessed under Title IX was in fact a penalty:

In re Standard Composition Co. (U. S. Dist. Court, Eastern Dist. Mich., 1938), 23 Fed. Supp. 391;

In re Hy-Grade Meat & Grocery Co., (U. S. Dist. Court of N. J., 1938) 26 Fed. Supp. 294;

Matter of Hale Coal Co. (U. S. Dist. Court, Eastern Dist. of Pa.) not officially reported, but may be found in C. C. H. Unemployment Insurance Service, Vol. 1, p. 3722.

Matter of Evans Brewery, Inc. (U. S. Dist. Court, Northern Dist. of N. Y.), not officially reported but may be found in C. C. H. Bankruptcy Law Service, par. 51,372.

Matter of Gahran Buick Co. (U. S. Dist. Court, Northern Dist. of N. Y.), not officially reported, but may be found in C. C. H. Bankruptcy Law Service, par. 51,489.

Matter of D. O. Sommers Co. (U. S. Dist. Court, Northern Dist. of Ohio, Eastern Division, October, 1939), not officially reported, but may be found in Prentice-Hall Bankruptcy Service, p. 8478.

The District Courts in the following cases have held to the contrary:

Matter of Royal Wilhelm Furniture Co. (U. S. Dist. Court, Western Dist. Mich., 1938), 23 Fed. Supp. 993;
In re Illinois Art Industries (U. S. Dist. Court, Western Dist. Mich., 1939), 27 Fed. Supp. 334;
In re Rich Maid Creameries, Inc., (United States Dist. Court, Southern Dist. of Cal.), reversed on stipulation of parties, 97 Fed. 2d 992. We are not informed as to the reason for such stipulation.

That the uncertainty created by this conflict adversely affects the expeditious administration and closing of innumerable pending bankruptcy cases and will continue to so affect such cases and future bankruptcy cases until and unless this Court shall exercise its power of supervision and hear and determine the present question.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. —, Matter of Independent Automobile Forwarding Corporation, Bankrupt, State of New York, Appellant *v.* United States of America, Appellee, and that the said decree of the Circuit Court of Appeals in the Second Circuit may be reversed by this Honorable Court, as prayed for by Peti-

tioner, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

July 8, 1941.

JOHN J. BENNETT, JR.,
Attorney General,
By HENRY EPSTEIN,
Solicitor General,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 251

In the Matter of

INDEPENDENT AUTOMOBILE FORWARDING CORPORATION,

Bankrupt,

STATE OF NEW YORK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion Below.

The opinion of the District Court is reported in 35 Fed. Supp. 919 and is to be found at page 13 of the Record. The opinion of the Circuit Court of Appeals is reported in 118 F. (2d) 537 and is to be found at page 25 of the Record.

II.

Jurisdiction.

The date of the decree to be reviewed is April 12, 1941 (R. 31).

Jurisdiction of this Court is invoked under § 240 of the Judicial Code, 28 U. S. C. A. 347.

III.

Statement of the Case.

The essential facts of the case herein are stated in the accompanying petition for Writ of Certiorari and in the interest of brevity are not repeated herein.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in the following particulars:

1. In failing to find and determine that the bankrupt estate was entitled to a credit amounting to 90% of the claim of the United States for taxes under Title IX of the Social Security Act.

2. In ordering that the claim of the United States for taxes under Title IX of the Social Security Act for the year 1937, filed in the amount of $3,400.49, be paid in the amount of $660.10 from the remaining assets in the bankrupt estate, and in failing to direct that the aforesaid claim be reduced by the amount of taxes due under the New York State Unemployment Insurance Law for the year 1937, but not to exceed 90% of the tax imposed under Title IX of the Social Security Act.

3. In failing to find and determine that 90% of the claim of the United States for unpaid taxes under Title IX of the Social Security Act for the year 1937,

constituted a penalty under the Bankruptcy Act and, therefore, was not allowable as a claim against the bankrupt estate.

V.

ARGUMENT AND AUTHORITIES IN SUPPORT OF PETITION.

Summary of the Argument.

Point A.

The bankrupt is entitled to a credit amounting to 90% of the claim of the United States for taxes under Title IX of the Social Security Act.

Point B.

The courts below, in limiting the credit to Eight Hundred Fifty-eight and 42/100 ($858.42) Dollars instead of allowing a credit of Three Thousand Sixty and 44/100 ($3,060.44) Dollars, thereby imposed a penalty.

Point A.

The bankrupt herein was adjudged a bankrupt on April 26, 1938, and since then the assets of the bankrupt have been in *custodia legis*.

During the year 1937, § 902 of the Social Security Act provided:

> "Sec. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only

for contributions made under the laws of States certified for the taxable year as provided in section 903."

Section 902 (a) of the Social Security Act, as amended, effective August 10, 1939, provides as follows:

"Sec. 902 (a) Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

(1) Before the sixtieth day after the date of the enactment of this Act;

(2) On or after such sixtieth day, with respect to wages paid after the fortieth day after such date of enactment;

(3) Without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction."

Congress never intended that 90% of the tax levied under Title IX of the Social Security Act should be a source of revenue to the United States. On the contrary, the credit provided for in § 902, *supra*, was an inducement to State legislatures to enact unemployment insurance laws.

Steward Machine Co. v. *Davis*, 301 U. S. 548, 585;
Carmichael v. *Southern Coal and Coke Co.*, 301 U. S. 495, 525, 526.

The credit provision was enacted for the further purpose of inducing taxpayers to pay their State unemployment tax on time. The provision was, therefore, of a purely regulatory nature. It was known that as time went on the number of taxpayers who would fail to pay the State tax on time and thus obtain the Federal credit would eventually reach the vanishing point.

In fact, only 10% of the tax assessed under Title IX was designed as revenue producing. Revenue thus produced was not intended for the general support of the Federal Government, but it was intended to be turned back to the State to defray the cost of administering the unemployment insurance law. Title III of the Social Security Act provides for the payment to the States to cover the cost of administering its unemployment insurance law. Title IX assessed the tax to raise the funds for this purpose. It was determined after investigation that 10% of the tax assessed under Title IX was sufficient to cover this fiscal need.

The amount realized by the United States upon its claim under Title IX will tend to reduce the State's claim for unemployment insurance. Since the money paid the United States on its claim under Title IX will eventually be paid back to the State, by reason of the provisions of Title III, it is, therefore, more practical to pay it directly to the State on its unemployment insurance claim. Paying this money directly to the State on its unemployment insurance claim, in accordance with our theory, merely negatives the necessity of the United States granting the money back as *parens patriae.*

Unless the bankrupt estate is allowed such credit the United States will receive an unexpected windfall. On the other hand, the failure to give this bankrupt estate the credit will work a hardship upon its creditors, for they, in effect, will be forced to pay indirectly that portion of the credit that is not allowed, inasmuch as payment upon their claims will be reduced correspondingly.

A Bankruptcy Court is a court of equity and is governed by rules of equity jurisprudence.

Matter of Ben Boldt, Jr., Floral Co., 37 F. (2d) 499; 15 A. B. R. (N. S.) 543;

Continental Ill. Bank and Trust Company v. *Chicago, etc.*, 294 U. S. 648; 27 A. B. R. (N. S.) 715.

The court said in *in re Standard Composition Co.*, 23 Fed. Supp. 391, 395:

> "The Bankruptcy Act was drafted with the principle that 'equality is equity' in mind, but there has been a tendency in recent years for the typical bankruptcy proceedings to resolve itself into a process in which one preferred party after another slices off a portion of the available assets, with little or none remaining for distribution to general creditors."

It is only by the fortuitous circumstance of the insolvent having failed to pay his unemployment tax on time that the United States could, in the first instance, claim the full amount of the tax assessed under Title IX without allowing for the 90% credit. The United States has suffered no loss by the failure of the insolvent to pay his unemployment tax into a State fund within the required time.

As an illustration, let us assume that in the instant case the sum of Nine Thousand Five Hundred Fifty-five and 86/100 ($9,555.86) Dollars was available for distribution instead of Three Thousand Fifty-three and 20/100 ($3,053.20) Dollars. The United States could not deny that if the trustee had this larger amount all tax claims would be paid in full except the tax claim under Title IX, and that would be reduced by 90%, or, in other words, it would be allowed only in the amount of Three Hundred Forty and 05/100 ($340.05) Dollars. Yet, because this estate does not have Nine Thousand Five Hundred Fifty-five and 86/100 ($9,555.86) Dollars, but less than one-third that amount, the United States is requesting this Court to interpret the self-same laws in such an inequitable manner as to permit it to share in these meager assets in the amount of Six Hundred Sixty and 10/100 ($660.10) Dollars, or nearly 100% greater than it would admittedly be entitled to were the assets greater.

Thus, it being admitted that an insolvent estate that is fortunate enough to have sufficient funds to pay all taxes in full can obtain the full 90% credit under § 902a (3) of the Social Security Act, it follows as a matter of equity and good conscience that the less fortunate insolvent estate, which has insufficient funds to pay all taxes in full, should also be given the full 90% credit. There is no language in the enactment which would require a Bankruptcy Court to do violence to the equitable principles underlying the administration of insolvent estates, pursuant to the Bankruptcy Act, and require it to enrich one creditor (United States under Title IX) at the expense of other creditors.

Congress enacted § 902a (3) for the benefit of creditors of insolvent taxpayers in order to relieve the situation arising where the taxpayer had neglected to, or was financially unable to pay his unemployment tax into a State unemployment fund within the required time, in order to obtain the credit under Title IX of the Social Security Act. Before this enactment, the insolvent estate became liable for what then would amount to a double tax, since liability for the tax under Title IX became ten times greater than if the State unemployment tax had been paid on time. This burden fell not upon the insolvent taxpayer, but upon the creditors. It is apparent that Congress, having acted to correct this situation, must be assumed to have done so in an equitable manner.

It seems clear that subdivisions (1) and (2) of § 902a were enacted for the benefit of certain taxpayers who had hitherto failed to pay their State unemployment tax, in order to give them a new and additional limited period of time within which to pay delinquencies into State unemployment funds and still obtain the credit against the Federal tax. By this enactment it was hoped to encourage these taxpayers to pay delinquent contributions into State unem-

ployment funds without further delay, and further, to overcome the injustices arising from situations, where, in many instances, taxpayers had been ignorant of their liability or financially unable to pay until after the time in which credit could be taken had expired.

The same purposes, however, did not motivate the enactment of subdivision (3) of § 902a. That subdivision is not for the benefit of the taxpayer, but for the benefit of the creditors of the taxpayer. It does not extend the credit for a limited time only, but provides that an insolvent estate must be given the credit no matter how long a time has elapsed since the effective date of the amendment. It was not the purpose of this enactment to encourage payment by the insolvent estate of the unemployment tax without delay, since it must be presumed that Congress knew that such payment can be made only according to judicial procedure. Therefore, it may be seen that the purposes motivating the enactment of subdivisions (1) and (2) are quite different than the results sought to be obtained by the enactment of subdivision (3).

Therefore, once it is perceived that the intent behind the enactment of § 902a (3) was to correct an inequity which fell upon insolvent estates and creditors of insolvents, it is but one step further to perceive the equally apparent intent of Congress that *all* insolvent estates and all creditors of insolvents are to be accorded the same equitable treatment. To accomplish this Congress could only have intended that *all* insolvent estates which were in *custodia legis* at any time during the fifty-nine-day period beginning August 10, 1939, should be given the full 90% credit regardless of the amount of the State tax, or when payment is made into an unemployment fund under a State law.

Appellant submits that the correct solution for distribution in the instant case, under both the Bankruptcy Act and

the Social Security Act, as amended, appears in Appendix "A" hereto attached.

The explanation of the solution, as shown on Appendix "A," is that as soon as the sum of Seven Hundred Ninety-nine and 94/100 ($799.94) Dollars (Col. 3) is paid for unemployment insurance, the estate is entitled to a credit of 90% of Eight Hundred Twenty-two and 84/100 ($822.84) Dollars (Col. 3), which is the amount of the distribution on Title IX tax. Column "4" shows this 90% credit to be Seven Hundred Forty and 56/100 ($740.56) Dollars, which becomes a part of the estate and is available for further distribution. The 10% balance of the Title IX distribution then left is Eighty-two and 28/100 ($82.28) Dollars, as shown in Column "5." The sum of Seven Hundred Forty and 56/100 ($740.56) Dollars, which is now available for distribution, is distributed in accordance with the percentages in Column "2," producing the amounts indicated in Column "6." Thereafter, the same procedure is followed after each distribution until we get the final result showing ultimate payments, as above, in Column "37." Column "1" of the appendix sets forth the total amount of the State and Federal claims. The percentages in Column "2" are arrived at by dividing each creditor's claim by the total liabilities which, in this case, amount to Twelve Thousand Six Hundred Sixteen and 30/100 ($12,616.30) Dollars.

We consider this to be the equitable solution of the problem. By applying this solution the Title IX claim is not reduced in excess of the 90% credit.

While it is true that the difference between the application of the algebraic formula used by the District Court herein, and our simple arithmetical computations, amounts to the sum of One Hundred Ninety-seven and 67/100 ($197.67) Dollars, as the amount for unemployment insurance contributions, nevertheless, we urge that the appel-

lant's proposed solution (Appendix "A") be applied so that it may be used in other cases where, if this solution be authorized, general creditors would receive a dividend which they would not otherwise receive, and for the further reason that appellant's solution will work in every case including those cases where the amount of distribution for State unemployment insurance taxes exceeds the maximum 90% credit against the Federal tax under Title IX. In such a situation the application of the algebraic quadratic equation, as used in the court below, becomes impossible as a mathematical proposition.

Point B.

Section 57 (j) of the Bankruptcy Act provides:

> "Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued according to law." (11 U. S. C. A. Sec. 93 (j).)

During the year 1937, § 902 of the Social Security Act provided:

> "Sec. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States

certified for the taxable year as provided in section 903."

Section 902 (i) of the Social Security Act, which was enacted on August 10, 1939, provides:

> "No part of the tax imposed by the Federal Unemployment Tax Act or by Title IX of the Social Security Act, whether or not the taxpayer is entitled to a credit against such tax, shall be deemed to be a penalty or forfeiture within the meaning of section 57 (j) of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, as amended."

Section 902 (i), *supra,* was enacted on August 10, 1939, became effective immediately, and is not retroactive. In effect, the Section declares that the tax assessed under the Federal Unemployment Tax Act, for the years 1939 and thereafter, shall not be deemed a penalty within the meaning of § 57 (j) of the Bankruptcy Act. The United States tax under Title IX, *supra,* involved in this proceeding was assessed for the year 1937.

It is patent that the enactment of § 902 (i) of the Social Security Act was a studied attempt by Congress to overrule the numerous court decisions that had declared that 90% of the tax assessed under Title IX was in fact a penalty.

See in accord:

In re Standard Composition Co., 23 Fed. Supp. 391;

Matter of Evans Brewery, Inc., U. S. D. Ct., N. D. N. Y., Commerce Clearing House Unemployment Insurance Service, Vol. I, p. 3703;

Matter of Hale Coal Co., U. S. D. Ct., E. D. Pa., *Id.* p. 3722;

Matter of Gahran Buick Co., Inc., U. S. D. Ct., N. D. N. Y., *Id.* p. 3721;

In re Hy-Grade Meat & Grocery Co., 26 Fed. Supp. 294.

Contra:

Matter of Royal-Wilhelm Furniture Co., 23 Fed. Supp. 993;

In re Illinois Art Industries, 27 Fed. Supp. 334;

In re Great Northern Hat Co., Inc., Commerce Clearing House Unemployment Insurance Service, Vol. I, p. 3692; (by implication only; the Refere held the tax a penalty; the District Court reversed on other grounds).

In re Rich Maid Creameries, Inc., S. D. of Cal., decided Dec. 7, 1937; (reversed on stipulation of parties, 97 F. (2d) 992; we are not informed as to the reason for such stipulation).

It is submitted that if part of the tax under Title IX is *in fact* a penalty, merely stating that it is not a penalty will not accomplish that result. The label placed upon a measure by the legislature is not determinative of its true character.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, the "Bituminous Coal Conservation Act of 1935" was under consideration. That Act imposed an excise tax on the sale of bituminous coal of 15% of the sale price at the mine, payable by the producers, provided, however, that any producer who filed with the Commission an acceptance of the code provisions, provided for in the Act, would be entitled to a drawback or credit equivalent to 90% of the tax. Concerning this provision the Supreme Court of the United States said at pages 288 and 289:

> "The so-called excise tax of 15 *per centum* on the sale price of coal at the mine, or, in the case of captive coal the fair market value, with its draw-back allowance of 13½%, is clearly not a tax but a penalty * * *.
>
> "* * * While the law maker is entirely free to ignore the ordinary meanings of words and make defi-

nitions of his own, *Karnuth* v. *U. S.*, 279 U. S. 231, 242; *Tyler* v. *U. S.*, 281 U. S. 497, 502, that device may not be employed so as to change the nature of the acts or things to which the words are applied."

Another case particularly applicable to the situation in the case at bar is *U. S.* v. *Constantine*, 296 U. S. 287. A provision of the Revenue Act of 1926 imposed a "special excise tax" of One Thousand ($1,000) Dollars in addition to the Twenty Five ($25.00) Dollars excise tax laid on retail liquor dealers who carried on such business contrary to local law. The Court in that case said at page 294:

> "The question is whether the exaction of $1,000 in addition, by reason solely of his violation of State Law, is a tax or a penalty? * * * In the Acts which have carried the provision, the item is variously denominated an occupation tax, an excise tax, and a special tax. If in reality a penalty it can not be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation, regardless of name. Disregarding the designation of the exaction, and viewing its substance and application, we hold that it is a penalty for the violation of state law, and as such beyond the limits of federal power."

In *Matter of Standard Composition Co., supra*, the Court said at page 393:

> "The label placed upon an imposition in a revenue measure is not decisive in determining its character. Although called a tax, it may in fact constitute a penalty, and, if so, the courts will not shut their eyes to the fact but will give it the same legal effect as a penalty which is designated as such."

The Court, continuing, said at page 394:

> "I hold that Congress in enacting social security legislation did not intend to amend the Bankruptcy Act by implication. In the determination of the legality

and priority of federal tax claims, the Bankruptcy Act is paramount over other federal and state statutes. *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U. S. 152, 32 S. Ct. 457, 56 L. Ed. 706; *Missouri* v. *Ross*, 299 U. S. 72, 57 S. Ct. 60, 81 L. Ed. 46; * * *"

Therefore, § 902 (i) of the Social Security Act can not be deemed an amendment of § 57 (j) of the Bankruptcy Act, despite its apparent attempt so to do.

The attempt by Congress in § 902 (i) (Act of August 10, 1939, 53 Stat. 1399) to amend § 57 (j) of the Bankruptcy Act is wholly ineffective. The treatment accorded § 902 (i) by Referee Friebolin, Northern District of Ohio, Eastern Division, in a decision handed down in October 1939, immediately following the enactment of that Section, in *Matter of D. O. Sommers Co.* (reported in Prentice Hall Bankruptcy Service, page 8478) is pertinent. The referee stated in part as follows:

"This whole difficulty arises *only if* the Court should hold that credit upon the Federal tax up to 90% thereof, is not a penalty. If it *is a penalty*, then without regard to the amount *actually paid* upon the state tax, the Federal Tax will be allowed for 10% of the full (3%) amount."

The referee then proceeded to hold that it was a penalty, continuing as follows:

"The express provision in the Federal Act (Sec. 902i) that it shall not be deemed a penalty within the meaning of Sec. 57 (j) is not controlling. 25 C. J. 1178 and 61 C. J. 1516. *U. S.* v. *Constantine* ('35), 296 U. S. 287:

" 'If in reality a penalty it can not be converted into a tax by so naming it and we must ascribe to it the character disclosed by its purposes and operation regardless of name.' *U. S.* v. *Childs* ('24), 266 U. S. 304, 5 A. B. (N. S.) 5:

"'This Court has declined to give it (interest) peremptory definition * * * and it may be * * * that the latter word ("interest") would not save it from condemnation if it were in effect the former ("penalty") * * *.'

"I am aware of the several holdings in other jurisdictions, in some of which this provision for deduction up to 90% for failure of the debtor to pay, is held to be a penalty and in others not. But it is to be remembered that these decisions were rendered before the amendments of 1939 containing the saving clauses quoted above, which permits credit where bankruptcy occurred, upon payment by the trustee."

Congress, as well as many State Legislatures, has attempted to insert into tax legislation various provisions for increasing the amount of the tax where a taxpayer fails to pay on a day certain. Wherever such legislation has come before a Bankruptcy Court, so much of the exaction as exceeded legal interest has been held to be a penalty and not provable in bankruptcy. In *Matter of Pressed Steel Car Co.*, 100 F. (2d) 147, it was held that an assessment in a New Jersey statute, which provided that "interest" should be collected at the rate of 1% per month upon unpaid franchise taxes, was a penalty despite the label placed upon it and, therefore, not provable in bankruptcy. To the same effect, see *In re Denver* v. *R. G. W. R. Co.*, 27 Fed. Supp. 983, and *In re Semon*, 11 Fed. Supp. 18.

In *Matter of James Butler Grocery Co.*, 22 Fed. Supp. 998, the bankrupt accepted unlawful rebates in buying milk, and after being given notice by the State Agriculture Department of a hearing for revocation of its license, it agreed to pay the amount of the rebates to the State in installments and the Department agreed not to hold the hearing. The Court held the payments were penalties within the meaning of § 57 (j) of the Bankruptcy Act, since the State sustained no pecuniary loss.

In like manner the United States, in the instant case, sustained no pecuniary loss by the failure of the bankrupt-taxpayer to pay the unemployment insurance tax to the State of New York on a day certain. In fact, the United States sustains no pecuniary loss if a taxpayer never pays a State unemployment insurance tax. It is, therefore, submitted that the failure to allow the credit on the tax imposed under Title IX of the Social Security Act is a penalty *in fact*, despite any declaration to the contrary in § 902 (i) of that Act.

Conclusion.

It is respectfully submitted that this case calls for the exercise by this Court of its supervisory power. The subject matter of this petition is of great importance because it affects the administration of innumerable bankruptcy estates. If the conflict in opinion between the various district courts continues to exist, the expeditious closing of many bankruptcy estates will be forestalled by the uncertainty created thereby. This Honorable Court has not as yet had the occasion to construe the effect of the provisions of § 902 of the Social Security Act with respect to its effect upon § 57 (j) of the Bankruptcy Act. We respectfully pray that this Honorable Court take jurisdiction in the premises herein.

Dated: July 8, 1941.

JOHN J. BENNETT, JR.,
Attorney General.
By HENRY EPSTEIN,
Solicitor General,
Attorneys for Petitioner.

APPENDIX (A).

Arithmetical Computations of Distribution Pursuant to Sections 902, 903A of Social Security Act—and Section 64A (4) of the Bankruptcy Act.

	1	2	3	4	5	6	7	8	9	10	11	12	13
Creditor	*Creditor's Claim*	*Percentage of Equity in Assets*	*Amt. Due Creditor 1st Payment*	*Credit 90% of Title 9 Payment*	*10% of Title 9 Payment*	*Distribution of 2nd Payment*	*Col. 3+ Col. 6*	*10% of Title 9 Payment*	*90% of Title 9 Payment*	*Balance of Title 9 Col. 5+ Col. 8*	*Distribution of 3rd Payment*	*Col. 7+ Col. 11*	*10% of Title 9 Payment*
Unemployment Insurance	$ 3,305.82	$ 26.20	$ 799.94	$	$	$ 194.03	$ 993.97	$	$	$	$ 47.06	$ 1,041.03	$
Title 9	3,400.49	26.95	822.84	740.56	82.28	199.58	281.86	19.96	179.62	107.08	48.41	151.65	4.84
Other Federal Taxes	3,189.19	25.28	771.85			187.21	959.06				45.41	1,004.47	
Other State Taxes	2,720.80	21.57	658.57			159.74	818.31				38.74	857.05	
Total Liabilities	$12,616.30	$ 100%	$ 3,053.20 (Total Available Assets)			$ 740.56	$ 3,053.20	$	$	$	$ 179.62	$ 3,053.20	

	14	15	16	17	18	19	20	21	22	23	24	25
Creditor	*90% of Title 9 Payment*	*Balance of Title 9 Col. 10+ Col. 13*	*Distribution of 4th Payment*	*Col. 12+ Col. 16*	*10% of Title 9 Payment*	*90% of Title 9 Payment*	*Balance of Title 9 Col. 15+ Col. 18*	*Distribution of 5th Payment*	*Col. 17+ Col. 21*	*10% of Title 9 Payment*	*90% of Title 9 Payment*	*Balance of Title 9 Col. 20+ Col. 23*
Unemployment Insurance	$	$	$ 11.42	$ 1,052.45	$	$	$	$ 2.77	$ 1,055.22	$	$	$
Title 9	43.57	107.08	11.74	118.82	1.17	10.57	108.25	2.85	111.10	2.29	2.56	108.54
Other Federal Taxes			11.01	1,015.48				2.66	1,018.14			
Other State Taxes			9.40	866.45				2.29	868.74			
Total Liabilities			$ 43.57	$ 3,053.20				$ 10.57	$ 3,053.20			

	26	27	28	29	30	31	32	33	34	35	36	37
Creditor	*Distribution of 6th Payment*	*Col. 22+ Col. 26*	*10% of Title 9 Payment*	*90% of Title 9 Payment*	*Col. 25+ Col. 28*	*Distribution of 7th Payment*	*Col. 27+ Col. 31*	*10% of Title 9 Payment*	*90% of Title 9 Payment*	*Col. 30+ Col. 33 Balance of Title 9*	*Distribution of 8th Payment*	*Total Final Distribution Col. 32+ Col. 36*
Unemployment Insurance	$ .67	$ 1,055.89	$ .07	$	$	$ .16	$ 1,056.05	$	$	$	$ .04	$ 1,056.09
Title 9	.69	109.23		.62	108.61	.17	108.78	.02	.15	108.63	.04	108.67
Other Federal Taxes	.65	1,018.79				.16	1,018.95				.04	$ 1,018.99
Other State Taxes	.55	869.29				.13	869.42				.03	869.45
Total Liabilities	$ 2.56	$ 3,053.20				$ .62	$ 3,053.20				$ .15	$ 3,053.20

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SUPREME COURT OF THE UNITED STATES.

Nos. 238 and 251.—October Term, 1941.

United States of America, Petitioner, 238 vs. State of New York.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
State of New York, Petitioner, 251 vs United States of America.	

[March 2, 1942.]

Mr. Justice Byrnes delivered the opinion of the Court.

The United States and the State of New York seek review of a judgment of the Circuit Court of Appeals for the Second Circuit reversing in part a District Court order for the distribution of the assets of a bankrupt estate. The Independent Automobile Forwarding Corporation was adjudicated a bankrupt on April 26, 1938. A total of $3053.20 eventually became available for distribution. This amount was insufficient even to meet those claims of the federal and state governments which were assertedly entitled to priority as taxes under § 64(a)(4) of the Bankruptcy Act.[1] The federal claims of this character were for amounts due under §§ 801 and 802 of Title VIII and under § 901 of Title IX of the Social Security Act,[2] and for certain taxes as to which

[1] "Section 64. Debts which have priority.—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof . . . ." U. S. C., Title 11, §104.

[2] C. 531, 49 Stat. 636, 639.

"Section 801. Income tax on employees. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of wages (as defined in § 811) received by him after December 31, 1936, with respect to unemployment (as defined in § 811) after such date: (1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum." U. S. C., Title 42, § 1001.

"Section 802. (a) The tax imposed by § 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages

no question is raised in this case. The state claims were for payments due its unemployment insurance fund, and for taxes not in issue here.

The state's appeal from the District Court's first order of distribution was discontinued by agreement of the parties because the Social Security Act had been extensively amended while the appeal was pending.[3] A second order was thereupon entered by the District Court. The state again appealed to the Circuit Court of Appeals. It contended that the share of the assets granted to the federal government was excessive for three reasons: (1) the claim based on § 801 of Title VIII of the Social Security Act was a claim for a debt rather than for taxes and thus was not entitled to priority under § 64(a)(4) of the Bankruptcy Act; (2) no more than 10% of the claim based on § 901 of Title IX of the Social Security Act was entitled to allowance because the balance constituted a claim for a penalty rather than a tax and thus fell within the prohibition of § 57(j) of the Bankruptcy Act;[4] and (3) the credit against the Title IX claim provided for in §902 was incorrectly calculated. The Circuit Court of Appeals sustained the state's contention with respect to the Title VIII claim and reversed to that extent the order of the District Court, but rejected the state's arguments with respect to the claim under Title IX.

First. The claim based on Title VIII. Section 801 bears the heading "Income tax on employees" and provides for a tax "upon the income of every individual" equal to 1 per

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as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer." U. S. C., Title 42, § 1002.

"Sec. 901. On and after January 1, 1936, every employer (as defined in § 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in § 907) payable by him (regardless of the time of payment) with respect to employment (as defined in § 907) during such calendar year: . . . (2) with respect to employment during the calendar year 1937 the rate shall be 2 per centum. . . ." U. S. C., Title 42, § 1101.

[3] C. 666. 53 Stat. 1360, 1399. See notes 9 and 10, *infra*.

[4] "Section 57(j). Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." U. S. C., Title 11, § 93(j).

centum of the wages received by him with respect to employment during 1937.[5] Section 802(a) provides that this tax "shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." The employer is made liable for the payment of the tax. By regulation, pursuant to Title VIII,[6] the Treasury Department has explicitly ruled that the tax may be assessed against the employer, regardless of whether he has in fact deducted it from the employee's wages. The Circuit Court held that the employer was liable "only as an agent bound to pay whether its duty to collect was performed or not" and that his liability was for a debt rather than for taxes.

As authority for this view it relied upon its decision of the same date in *City of New York* v. *Feiring*, 118 F. 2d 329. The city sales tax involved in that case was laid upon receipts from sales of personal property. The vendor was required to collect the amount of the tax from the vendee separately from the sales price. He was obliged to report periodically concerning his receipts from sales and to turn over to the City Comptroller the taxes due, whether or not he had actually collected them from the purchasers. If the vendor failed to collect the tax, the vendee was required to report the transaction and to pay the tax directly. Thus, the procedure contemplated was that the purchaser should bear the burden of the tax, but that the seller should collect and transmit it to the Comptroller. If the seller did not obtain it from the purchaser, however, the Comptroller was authorized to proceed to collect it from either of them. The Circuit Court of Appeals held that the claim of the City against a bankrupt vendor for the amount of the sales tax outstanding was a claim for a debt and not for taxes, within the meaning of § 64(a)(4). We reversed this decision and held that the burden imposed upon the seller by the city taxing act had "all the characteristics of a tax entitled to priority" under § 64(a)(4). 313 U. S. 283.

We think that our decision in the *Feiring* case is controlling here. The New York City sales tax involved in that case and the obligation imposed by §§ 801 and 802 of Title VIII of the Social Security Act cannot be distinguished in any material

[5] Both the pertinent state and federal claims are for the year 1937.

[6] Treasury Regulations 91, Article 505.

respect. It was observed in the *Feiring* case that while the sales tax was intended to rest upon the purchaser "in its normal operation", "both the vendor and the vendee are made liable for payment of the tax *in invitum* . . . and the tax may be summarily collected by distraint of the property of either the seller or the buyer." 313 U. S. 283, at 287. The burden of the tax provided for by §§ 801 and 802 likewise will normally rest upon the employee, but the Commissioner of Internal Revenue may proceed to collect it from the employer whether or not he has deducted it from the wages of the employee.

Two distinctions between the cases are urged by the State. One is that § 802(a) of Title VIII provides that the tax "shall be collected by the employer of the taxpayer" and thus reveals a Congressional intent that only a claim against the employee should be treated as one for a tax. The other asserted distinction is that Title VIII in its entirety is designed to impose two distinct taxes; § 801 imposes an "income tax" upon the employee, while § 804 imposes an "excise tax" upon the employer.[7] But a tax for purposes of § 64(a)(4) includes any "pecuniary burden laid upon individuals or property for the purpose of supporting the government," by whatever name it may be called. *New Jersey* v. *Anderson*, 203 U. S. 483, 492. Although he may not be referred to in §§ 801 and 802 as the taxpayer, and although he may also be subject to the "excise tax" prescribed by § 804, the plain fact is that the employer is liable for the § 801 tax whether or not he has collected it from his employees. We therefore hold that the Title VIII claim of the United States against the estate of this bankrupt employer is entitled to the priority afforded by § 64(a)(4).

Second. The claim under Title IX. Section 901 imposes upon this employer, in addition to the obligations discussed above, an "excise tax" equal to 2 per centum of the total wages payable by him during 1937. Section 902, however, permits him to credit "against the tax imposed by § 901" the amount of his

[7] "Section 804 Excise tax on employers. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in § 811) paid by him after December 31, 1936, with respect to employment (as defined in § 811) after such date: (1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.". U. S. C., Title 42, § 1004.

1937 contributions to the State unemployment fund, but provides that the total credit "shall not exceed 90 per centum of the tax against which it is credited."

(a) The State contends that § 902(a) in effect exacts a penalty, equal to 90% of the amount of the tax levied by § 901, from an employer who fails to make the payments to the State unemployment fund required by state law. Since § 57(j) of the Bankruptcy Act provides that claims by the United States for penalties are not allowable,[8] it argues, only 10% of the tax imposed by § 901 is actually a tax for purposes of § 64(a)(4) of the Bankruptcy Act. There is no merit to this contention. While the issue here is cast in somewhat different terms, it is similar in outline to that raised by the constitutional objection to the Act which was set to rest in *Steward Machine Co.* v. *Davis*, 301 U. S. 548. There it was argued that the 90% credit provisions amounted to coercion of the States which was repugnant to the Tenth Amendment and to the federal system. The Court recognized that the effect of the scheme was to encourage the States to establish and maintain unemployment insurance funds and thus to cooperate with the federal government in meeting a common problem. It observed that "every rebate from a tax when conditioned upon conduct is in some measure a temptation" but it concluded that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties", and to accept "a philosophical determinism by which choice becomes impossible." 301 U. S. at 589-590. These considerations are equally pertinent to the suggestion that the 90% rebate arrangement constitutes the imposition of a "penalty" within the meaning of § 57(j) upon an employer who fails or refuses to contribute to a state fund. The amount of the tax assessable under § 901 is definite and fixed, once the single variable, the total of the wages paid during the year, is determined. Although the employer is free to obtain a credit against it by contributing to his state fund, it cannot be said that it is any the less a tax because the employer has failed, either through choice or lack of resources, to make such a contribution. Either the state or the federal government must provide the money to meet the requirements of relief to the unemployed. By his contributions to the state, an employer has diminished the demand

[8] See note 4, *supra*.

upon the financial resources of the federal government. But by his failure to contribute, the employer has increased this demand and sharpened the necessity for obtaining the revenues required to satisfy it. The effort by the United States to obtain the revenue by denying the credit must be regarded as the levying of a tax and not as the exaction of a penalty.[9]

(b) Finally the state contends that the District Court applied an incorrect formula in determining the amount of the credit deductible under § 902. Section 902 provides: "The taxpayer may credit against the tax imposed by § 901 of this chapter the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year)[10] into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited . . ." In the case of a bankrupt who has not made any contribution to the state unemployment fund at the time of adjudication and whose assets are insufficient to meet the total of the claims of equal priority, the calculation of the credit is beset with some difficulty. The amount available for the state's claim for its unemployment insurance fund is contingent upon the sums allowed on the other claims, including that of the federal government under § 901. The amount to be allowed on the claim of the United States is in turn dependent upon the credit deductible from it under the terms of § 902. And this credit under § 902 is determined by the sum granted on the state's unemployment insurance fund claim.

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[9] In 1939 Congress undertook to put an end to any doubts on this question by providing in § 902(i) of the amendments to the Social Security Act that no part of the tax imposed by Title IX should be deemed a penalty or forfeiture within the meaning of § 57(j) of the Bankruptcy Act. C. 666, 53 Stat. 1360, 1400.

[10] This condition had not been complied with in the present case. However, the 1939 amendments to the Social Security Act, which resulted in the dismissal of the first appeal by stipulation, provided that the credit should be allowed on payments to the state fund "without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction." § 901(a)(3). C. 666, 53 Stat. 1360, 1399. This bankrupt estate qualified under this provision.

Because of this mutual dependence the courts below have accepted and approved an algebraic solution of the problem. Under this solution the claim for the tax assessed under § 901 is diminished by subtracting from it an amount equal to the sum allowed to the State for its unemployment fund. The formula by which this is accomplished is reducible to a quadratic equation capable of solution by the recognized method.

As against this algebraic solution, the State urges an arithmetical calculation which would afford it a larger share of the assets. In brief, the state's theory is as follows: The amount of each of the several claims of the State and of the United States should be divided by ~~the sum of the assets available~~ the total of such claims. The percentage of the assets due on each claim is thus determined. The total of the assets available is then multiplied in turn by these percentages, and the actual sum to be allowed on each claim is found. However, the amount allowed on the federal government's claim under § 901 is then multiplied by 10%. The sum equal to this 10% is thereupon conclusively granted to the United States. But the remaining amount, equal to 90%, is returned to the estate as a second fund to be divided among all the claims in the same manner. The share of this second fund which by this computation would go to the United States on its § 901 claim is again multiplied by 10%, with the balance of 90% returning to form a third fund. The process is repeated until the still undistributed assets reach a vanishing point.

It will be observed that while the one solution is algebraic and the other arithmetic, there is little to choose between them in terms of complexity. The obvious fact is that neither the Bankruptcy Act nor the Social Security Act afford the courts any meaningful assistance in solving the problem raised by this case. And their legislative history is equally barren.

The State objects to the formula applied below because its effect is to accord the United States a larger sum in dollars and cents on its §901 claim than it would receive if the available assets were sufficient to discharge in full all of the priority claims. This is true because, under § 902, the United States would be entitled to no more than 10% of its § 901 claim if the unemployment fund claim of the State was paid in full. We agree that this result is somewhat incongruous. However, the method of computation urged by the State embodies so basic

an error that we cannot accept it. Section 902 permits the credit "against the tax imposed by § 901." Under the State's formula the credit is reckoned in terms of a sum determined by that formula to be *actually available* to the United States on its § 901 claim rather than in terms of the whole amount *actually due* under that section. We think that the words "the tax imposed" must mean "the tax demanded" or "assessed" or "due". It can hardly be thought to mean "the tax paid" or "the amount available for payment of the tax". The formula adopted by the District Court avoids this error by crediting the undetermined sum available to the state unemployment fund against the total tax assessed or claimed under § 901. We therefor hold that the District Court and the Circuit Court of Appeals did not err in adopting and using that formula.

The judgment of the Circuit Court of Appeals is reversed with respect to the claim under Title VIII, but is otherwise affirmed. The case is remanded to permit the reinstatement of the judgment of the District Court.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.